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THURSDAY, June 5, 1975

The hearing reconvened at 9:30 A.M. on Thursday, June 5, 1975, in the Chambers of the Montana House of Representatives, State Capitol, Helena, Montana.

The Honorable Carl M. Davis, Hearings Examiner, presided over the proceedings:

APPEARANCES:

APPLICANTS

William M. Bellingham, Esq.
John L. Peterson, Esq.
John Ross, Esq.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

Arden E. Shenker, Esq.
Robert T. Cummins, Esq.
Ted J. Doney, Esq.
Donald McIntyre, Esq.

BOARD OF HEALTH AND DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES

Richard Klinger, Esq.
Steve Brown, Esq.

NORTHERN CHEYENNE TRIBE, INC.:

Peter Michael MeLoy, Esq.

NORTHERN PLAINS RESOURCE COUNCIL:

Leo Graybill, Jr., Esq.

The following proceedings were had:

HEARING EXAMINER: Let's get on the record and see if we can get a few moments of testimony in. Are the parties ready to proceed?

MR. BELLINGHAM: The Applicants are ready, sir.

MR. SHENKER: The Department is ready.

HEARINGS EXAMINER: Very well, Mr. Shenker, you may continue with your cross-examination of Mr. Hofacker.

CONTINUATION OF EXAMINATION OF ROGER A. HOFACKER

Re-Cross, Department of Natural Resources and Conservation

By Mr. Shenker (continued)

Q Mr. Hofacker, I wanted to follow up on a few items that we were discussing yesterday on some of the points that Mr. Bellingham had put to you on redirect examination yesterday afternoon. One of the points, sir, was with respect to public injury suffered as a result of not meeting contractual commitments to customers or other load requirements as to customers. You are not aware, are you, sir, within the last two or three years of any reductions even in projected contractual commitments caused by cancellation of contract or the cessation of negotiations with major industrial customers or consumers aside from Anaconda?

A I am not.

Q Then, with respect to the amount of energy which you forecast on the exhibits numbered 5 and 6 in this proceeding, as I understand it, the chief negotiator with the Bonneville Power Administration for Montana Power Company is now Don Gregg, is that right?

A Yes, sir.

Q And what he has planned, as instructed to him, is to negotiate for 100 megawatts of peak energy, is that right?

A As far as "instructed," I am not sure of that connotation, but that is what has been negotiated as an exchange of energy

1 for peak, yes, sir.
2 Q These are the ones doing the negotiations?
3 A He and others, but he is the principal one, yes, sir.
4 Q What he's seeking is to get a 100 megawatts of peak?
5 A Yes, sir.
6 Q Actually, in determining the hydro critical level, that's the
7 low water flow, what you do to determine your average re-
8 sources is to go back to the year 1928, isn't it?
9 A The historical record, yes, sir.
10 Q Back to 1928?
11 A I believe that's right, yes, sir. There are records preced-
12 ing that.
13 Q And it is true, is it not, in negotiations now pending with
14 the Bonneville Power Administration, there is nothing now
15 under negotiation to increase the Montana Power Company's
16 energy capability?
17 A Not to my knowledge.
18 Q Mr. Hofacker, you do have on your forecast of resources a
19 minus figure for energy, do you not, as a result of the basis
20 on which you are negotiating for the purchase of peak from the
21 Bonneville Power Administration?
22 A Will you restate that again? I maybe missed the very first
23 part.
24 Q Yes. You are now forecasting a minus energy among your re-
25 sources as a result of your negotiations with Bonneville for
26 peak, isn't that true?
27 A That's without Colstrip, yes, sir, without Colstrip 3 and 4.
28 Q Even with Colstrip 3 and 4, do you not project that you would

1 have a minus figure of some 19 megawatts in energy as a re-
2 sult of your interchange of energy with Bonneville for peak?
3 A Yes, sir, but not a deficit of energy as far as resources
4 for our load with Colstrip 3 and 4.
5 Q But overall, that's true?
6 A Yes, sir.
7 Q But as you now project your resources, because you are seeking
8 in negotiations with Bonneville to obtain a hundred megawatts
9 of peak, you are going to pay for that by giving them, for
10 example, in the year 1985 to 1986, 19 megawatts of energy,
11 which is therefore a minus figure for you?
12 A Yes, sir, because we'll need peak worse than energy as we
13 get out in time.
14 Q It is true, is it not, Mr. Hofacker, that if you did not have
15 to give up those 19 megawatts of energy by obtaining peak
16 through some other means, then you'd have that additional
17 load of energy available to you?
18 A Yes, we would, but I'm not sure we could get it elsewhere,
19 sir.
20 Q Well, you know, do you not, Mr. Hofacker, that the increase of
21 hydro facilities, even in the Montana Power Company system,
22 would give you additional peak resources?
23 A Yes, it would.
24 Q We talked about the term, "median water adder," and I want to
25 make sure the record is clear that the figure, median water
26 adder, means the annual average additional energy that is us-
27 able from the hydro system for energy purposes?
28 A That is not exactly the correct definition, sir.

1 Q How would you phrase it?
2 A Median means that it is different than average. Average is
3 when you add up all the surplus over critical during a period
4 of years and divide by the number of years. Median is that
5 there were as many years with more than that water and as
6 many years less than that. It doesn't have much to do with
7 the amounts in each of the years.
8 Q Well, although a median may not be a mean in the sense of an
9 average, in the case of the historical record of Bonneville
10 adder of water, the median is pretty close to the mean, isn't
11 it?
12 A It may well be. History may change that, but at the present
13 time it may well be fairly close.
14 Q What the median water adder strictly means is that as many
15 times in history you have had even more water than that as
16 you have had less water than that?
17 A As I so previously stated, yes, sir.
18 Q Now, the exhibits which you have offered in the course of
19 your testimony, Mr. Hofacker, were in large measure prepared,
20 Exhibits 3 through 11, in any event, before you get to 12 and
21 13, by Donald Gregg, weren't they?
22 A Under his supervision, sir.
23 Q And they were prepared prior to April 16th of this year, were
24 they not?
25 A I think some were. I think there may have been -- I don't
26 remember whether the 16th of April was the final date.
27 Q Well, his deposition was taken on April 16, 1975, at which
28 time he was asked about exhibits 3 through 11 and stated that

he had prepared most of those, so they of course were prepared by the time his deposition was taken?

A There had been preparation of them, but I don't know whether that was the date of the final determination of them, because there had been some revisions and they may well have been prior to that date. I'm not sure of the date, sir.

Q Well, that's what I wanted to ask you. Do you think that there had been any last-minute revisions in some of those exhibits which show the loads and forecasts and resources?

A None beyond those that have been submitted as the exhibits, whenever that was done.

Q Do you know of any revisions made to any of the load forecasts and load resource availability from April 16th of 1975 until the commencement of this hearing?

A I said I did not know whether there were or not.

Q In terms of your short-term load forecasting, you do not use any trend mathematical technique for that, do you?

A Well, we take our trend. We start with our trended extrapolation and then assess that to see if that fits with what we know in the short-term as to economics and the other factors we've gone over many times, but the first step we took was the trended extrapolation and then varied from that as we deemed necessary.

Q In short-term load forecasting, it is correct, is it not, that you do not use mathematical trending directly?

A It's only in the calculation, but it is not the final determination, the determinating factor, no, sir.

Q In your short-term load forecasting, what you do is to make a

1 judgment based upon your most current and recent experience,
2 and then you make a revision without the trending?
3 A Yes, sir.
4 Q It is true, is it not, Mr. Hofacker, that when you reduced
5 your load forecasts for 1976 and 1977, you did so on the basis
6 of the last 18 months of performance of loads?
7 A I don't know whether it was specifically the last 18 months,
8 but it was recent experience, yes, sir.
9 Q And your Exhibit No. 9, which is your data base line, shows
10 about a 3% decrease of total load projections from your
11 earlier estimate, doesn't it?
12 A Yes, sir, because the previous year was higher than the pro-
13 jection.
14 Q Now, Mr. Hofacker, in terms of the critical years that you
15 were talking about with Mr. Bellingham and with me for a
16 little bit yesterday afternoon, are you familiar with what is
17 called the "Grit Study" of the Portland General Electric
18 Company?
19 A Only partially familiar with it, but I'm aware of such a
20 study.
21 Q Are you aware of their study findings with respect to the
22 annual operating costs comparing a nuclear plant at Boardman
23 with a coal-fired plant at Boardman with a coal-fired plant
24 at Colstrip?
25 A Yes, sir.
26 Q And in the comparison with the coal-fired plant at Colstrip,
27 there were three different comparisons in the Colstrip alter-
28 native, one having a radial 600-KVDC, the other having a

radial 500-KV, and the other having a redundant 500-KV?

A I don't remember those specific details, sir, no.

Q What is a redundant 500-KV?

A It could be another line that was there in case the first one went out. That would be the only interpretation I could put on it.

Q Like two single-circuit lines?

A Yes, sir. I don't know that I would call the second one redundant if you wanted to have a firm delivery capability.

Q Did you know, sir, that the PGE Grit Study with respect to this particular comparison of Boardman Nuclear, Boardman Coal and Colstrip on the three sub-alternatives I just described finds that except for the first 1500 hours of operation per year, Boardman Nuclear is always cheapest, Boardman Coal-fired is thereafter always cheapest, and the Colstrip, with, as they call it, the redundant 500-KV, is always the most expensive?

A I'm not aware of that, sir.

Q In the load forecasts which you have used from February of 1974 to date, Mr. Hofacker, Rob Stuart has been the principal one who has put those together for you, hasn't he?

A Yes, he was the one who did the numbers work, the calculations.

Q Mr. Stuart joined the Montana Power Company about two years ago?

A Might be two, three, I don't remember, but in that area.

Q He had a three-credit course in engineering economics at Montana Tech in the spring of 1972 before he graduated?

A I don't know what he had at school, sir, other than he got a degree in mathematics.

Q You wouldn't deny that the extent of his economic background was a three-credit course in engineering economics?

A Yes, sir, but he doesn't make the forecasts in a vacuum, in any way, shape, or form.

Q "Yes,sir" means you don't deny that fact about his economic background?

A Yes, sir.

Q His first employment after graduation was with the Montana Power Company?

A It may well have been. I don't recall.

Q It is true, is it not, that there has not been any complete load forecasting done by the Montana Power Company starting from scratch, abandoning the old load forecast, since August of 1972?

MR. BELLINGHAM: We object, on the grounds that it is repetitious and improper cross-examination.

HEARINGS EXAMINER: Sustained.

Q Well, with respect to Exhibit No. 9, about which Mr. Bellingham asked you in direct -- redirect examination -- yesterday afternoon, it is true, is it not, sir, that the trend base that you show there is reflected most recently in a load forecast which started from scratch in 1972?

A The trend, sir, reflects all of the history to the present date.

Q It is true, is it not, that the load forecast of 1972 is the last one you did that started from scratch?

A It started from scratch, yes, sir. I would add, because we saw nothing to change that basis. When we do, we will start from scratch again.

Q In any of the load forecasts which you described in your redirect examination yesterday, Mr. Hofacker, did you perform a standard error of estimate?

A No, sir.

Q What is a standard error of estimate?

A It's a probablistic determination.

Q Have you ever used that in load forecasting?

MR. BELLINGHAM: We object on the grounds it is incompetent, repetitious, improper.

HEARINGS EXAMINER: You may answer yes or no.

A We have tested at some time in the past. I don't recall when, using this mathematical deal, but we are not using it now, at the present time.

Q Have you ever used it?

A I said we tested our load forecast using it, yes, sir.

Q Did you use it for a load forecast as opposed to whether you would use it for that purpose?

A We took a load forecast and saw what the standard error might be, related to that.

Q With respect to those same load forecasts that extend from Exhibit 3 through Exhibit 7, Mr. Hofacker, it is true, is it not, that you have not looked into the development of electrical price ranges over the projected period of the use of units 3 and 4?

A I have not, sir.

Q It is also true, is it not, that the Planning Department, as a matter of fact, has made no specific study of the general economy?

MR. BELLINGHAM: We object on the grounds it's repetitious and improper cross-examination.

HEARINGS EXAMINER: Sustained.

Q Well, Mr. Hofacker, Mr. Bellingham specifically asked you yesterday with respect to the forecasting technique which you used in Exhibits 3, 5 and 9. He also asked you with respect to Exhibits 12 and 13 in your economic analyses. Now, is it not true, sir, that notwithstanding those load forecasts and the extent to which you have looked at the economy in connection with those load forecasts, and notwithstanding the economic studies which you have done for this proceeding, your Planning Department has made no specific study of the general economy?

MR. BELLINGHAM: We object on the ground that it's repetitious, the same question that was asked immediately previously, improper.

MR. SHENKER: He did specifically, on redirect examination, attempt to rehabilitate this witness's exhibits by asking him the extent to which economic conditions were taken into consideration.

MR. BELLINGHAM: I do not think the record will sustain that remark.

HEARINGS EXAMINER: Which exhibit are you referring to?

MR. SHENKER: Applicants' Exhibits 6 and 13. On

both of those, the same point was made.

MR. BELLINGHAM: I have absolutely no recollection of examining him relative to the economic background or input that went into those exhibits. Minor questions were asked, limited in scope, that had nothing to do with the economic background of the studies.

MR. SHENKER: The attempt was made to rehabilitate those specific exhibits on redirect examination; therefore, we are entitled on re-cross examination, to probe that rehabilitation.

MR. BELLINGHAM: Sir, this is more reiteration, that has gone on, undiluted, for some weeks -- or two -- of this particular witness. I see no reason for any further repetition to draw this portion of the hearing out for another day or two or three, whatever Mr. Shenker has in mind.

MR. SHENKER: Well, I want the record to be clear. Mr. Bellingham spent 16.2 hours in direct and redirect examination of this witness. On cross and re-cross examination, thus far, I have spent less than 16 hours on this witness, and I don't think that it's quite fair for Mr. Bellingham to three times, now, have implied that it's the cross-examination that has delayed this witness's testimony. It was the direct and redirect testimony that took the bulk of this time so far.

MR. BELLINGHAM: I'm sorry if I implied that. I meant to state it directly, sir. I didn't mean to imply it.

HEARINGS EXAMINER: Very well, the objection is going to be sustained, because the question has been asked many times if there were no economic studies with regard to load forecasting.

Q Is it not true, Mr. Hofacker, that there is no variable for population growth built into your computer program on load forecasts?

MR. BELLINGHAM: We object for the same reasons as previously, it's repetitious, and improper re-cross.

HEARINGS EXAMINER: He may answer that question.

A No.

Q No, there is no such variable built in?

A There is no such variable built in.

Q Is it also not true, Mr. Hofacker, that there is no record of available natural gas supply included in the Planning Department's preparation of your load forecasts?

MR. BELLINGHAM: We object, Your Honor, on the grounds that it's repetitious, improper re-cross and exceeds the scope of the redirect.

HEARINGS EXAMINER: Sustained.

Q Well, is it not true, Mr. Hofacker, irrespective of what's available in the Planning Department, that with respect to the load forecasting which Mr. Bellingham asked you about on redirect examination yesterday, you did not put natural gas availability into such forecasts?

MR. BELLINGHAM: We object on the same grounds previously stated.

HEARINGS EXAMINER: He may answer yes or no.

1 A I could not answer that unqualified in either way.
2 Q Why not?
3 A Because that matter was included in the judgment on the load
4 forecasts, but not in the computer program that was used for
5 the numbers work.
6 Q It wasn't reflected in Rob Stuart's judgment, it was reflected
7 in somebody else's judgment?
8 A Rob Stuart was part of the determination, he, with others.
9 Q You would not deny, would you, Mr. Hofacker, that Mr. Stuart
10 has told us under oath in his deposition that he did not put
11 natural gas availability into his load forecasts?
12 MR. BELLINGHAM: We object on the grounds that
13 it's improper re-cross, repetitious, and an incorrect
14 use of the deposition.
15 MR. SHENKER: Well, that's a new objection. I
16 don't know what's wrong about asking Mr. Hofacker if he
17 would deny a statement made by one of his subordinates
18 under oath. Even in a court of law that's an appropri-
19 ate question.
20 MR. BELLINGHAM: We repeat our objections, sir.
21 HEARINGS EXAMINER: Overruled. You may answer the
22 question yes or no.
23 A Again, I would wish not to answer simply yes or no.
24 HEARINGS EXAMINER: Answer if you know.
25 Q Do you remember the question, Mr. Hofacker?
26 A I remember the question. I think it was perhaps incomplete,
27 but I remember your question, sir.
28 MR. BELLINGHAM: Mr. Hofacker, why don't you answer

1 the question as best you can with appropriate explana-
2 tion?
3 A I believe the response may have been in a different light
4 than what it appears from the statement that you have made
5 now. I believe reading the scenario into that question may
6 clarify it.
7 Q Does this help you, Mr. Hofacker, page 48 of Mr. Stuart's
8 deposition, April 9, 1975? "Question: Do you have a record
9 of what available natural gas supplies are for the period
10 covered by your forecast? Answer: No, I don't. Question:
11 Do you tab that into your computer program on your most recent
12 load forecast? Answer: What do you mean by tab it into?
13 Question: Did you put it into the program for determining
14 what your forecast would be? Answer: No." Would you accept
15 that?
16 A I would, but that's only part of the forecast.
17 Q Now, when we were talking about forecast most recently, we
18 are, of course, talking about the one dated February 28, 1975,
19 done by Rob Stuart?
20 A He compiled it, yes, sir.
21 Q He presented his figures to Mr. Gregg, head of the Planning
22 Department now, and you, for review, isn't that right?
23 A Yes, sir.
24 Q And those figures came back to Mr. Stuart unchanged, didn't
25 they?
26 A They did, sir.
27 Q Now, as to the prices of electricity and the effect that those
28 would have on your projections for resources, it is true, is

it not, that no studies were made to check as to the effect of the increase in the price of natural gas on load forecasts?

MR. BELLINGHAM: We object, Your Honor, on the ground that it's repetitious, improper re-cross.

HEARINGS EXAMINER: Sustained.

Q It is true, is it not, that no studies were put into the computer as to the effect of any increase in price of natural gas on load forecasts?

MR. BELLINGHAM: We object on the same grounds as heretofore.

HEARINGS EXAMINER: Sustained.

Q Mr. Hofacker, you know, do you not, that since February of 1974, the chief load forecaster in preparing the actual calculations, is Rob Stuart, and that he has never made any analyses to determine the effect of price on load demand?

MR. BELLINGHAM: We object on the grounds of improper re-cross.

MR. SHENKER: We have had, on redirect examination, Mr. Bellingham's attempt to try and rehabilitate the load forecasting procedures. Now, this question is a proper way of trying to cross-examine what Mr. Bellingham did on redirect. I appreciate the fact that we have a hearing that starts in two minutes before the Board of Health, but I think that is no basis for restricting our re-cross-examination to the tactical advantage of Mr. Bellingham.

MR. BELLINGHAM: I wasn't aware that I attempted to rehabilitate any witness upon redirect, because I didn't

feel that any witness needed to be rehabilitated, contrary to what Mr. Shenker has attempted to assume and put in the record. As far as redirect is concerned, this particular phase and this particular field that Mr. Shenker is getting at, was not delved into at all by me according to my recollection. I feel quite confident that the record will bear me out on that. We are merely going back into repetitious material that was brought out on direct, but certainly not on redirect.

MR. SHENKER: He specifically asked on redirect, "Do you have to change your load forecast as your needs move and as circumstances change?" and if changes in price are not circumstances which should be reflected in a load forecast, I'd like to know that from Mr. Hofacker.

HEARINGS EXAMINER: I believe on your cross-examination, that question was asked several times, but if I'm in error on that, then the record will bear it out when it is transcribed and the people that read it can make their judgment on it. We did spend a lot of time, and I think that question was asked by more than one party, but I'll overrule the objection, and you may answer that question. Do you remember what it is? If not, he can repeat it.

A I'd like to have it repeated.

Q The question, Mr. Hofacker, as I put it to you as I recall it, was, is it not true that the man who has been the chief load forecaster responsible for preparing the actual calculations, the "RCS," whose initals appear on your load forecasts of

February '74 and November '74 and February '75, Rob Stuart, has neither made any analyses to determine the effect of price on load demand, nor knows of anyone at Montana Power who has done so?

A I have to answer no to that, but I need to follow up that -- furthermore, he is not our chief load forecaster, sir; secondly, in spite of the fact that there were no formal studies -- numbers work -- done, the effect of those items that you mentioned were considered in the judgment of the forecast that resulted.

Q But not by him?

A Not by him, necessarily. He was part of the group that assessed this, but not by him specifically.

Q You do not deny that he has not made any such analyses, do you?

A As he said, he may not have personally made any such analysis.

HEARINGS EXAMINER: Very well, it looks like you're not going to get through with this witness, so we'll discontinue the cross-examination of this witness at this time and he may be recalled for the purpose of completing this cross-examination some time down the road, at which time you'll all be able to read the transcript and think up all the new questions, but I hope you'll also try to remember the ones you've asked. All right, this is the time set for the public hearing before the Board of Health and Environmental Sciences of the State of Montana to receive evidence on the question of certification by said Board of Health and Environmental Sciences

to the Board of Natural Resources of the State of Montana, as required by Section 70-810 and Section 70-817, Revised Codes of Montana, 1947, as amended, commonly called the Utilities Siting Act of 1973, of the ability or inability of the facilities proposed by Puget Sound Power and Light Company, Portland General Electric Company, Washington Water Power Company, Pacific Power and Light Company, and the Montana Power Company, hereinafter collectively referred to as Applicants, and as set forth in their application for a certificate of environmental compatibility and public need, to comply with the Federal and State established standards for air and water quality provided for in Title 69, Chapter 39 and Chapter 48 of the Revised Codes of Montana, 1947, as amended, or rules promulgated thereunder in the implementation plan submitted therefor, and whether the proposed facilities will violate any of the above-mentioned standards. Now, at this time, many of the persons present are also in attendance at the hearing we are presently in session in before the Board of Natural Resources and Conservation concerning the aforesaid application for a certificate of environmental compatibility and public need. As Hearings Examiner for the Board of Natural Resources and Conservation, I intend to now adjourn the Board of Natural Resources hearing until the conclusion of the Board of Health's hearing, provided, however, that in order to avoid a great deal of duplication of time and expense, and as counsel and I have previously discussed in these

proceedings, I would direct that a complete copy of the transcript of the proceedings and the exhibits received in evidence at the Board of Health hearing be incorporated by reference into the Board of Natural Resources hearing and that copies thereof be forwarded to the members of the Board of Natural Resources at the same time as copies are mailed to the Board of Health and Environmental Sciences. Now, before I do this, I would at this time hear any comments, suggestions or objections to proceeding in this manner, and this is related to what I've said now and then we'll go on into new motions, matters, procedure, later on. Mr. Shenker?

MR. SHENKER: Yes, if the Hearings Examiner please, we agree with the Hearings Examiner's statement of his intention as something that has been discussed by counsel with the Hearings Examiner previously, and we would go on record as favoring the incorporation into the record of the Board of Natural Resources and Conservation, all of the record before the Board of Health and Environmental Sciences. We make that statement now in the record of this joint and concurrent hearing before there is an adjournment of the hearing before the Board of Natural Resources and Conservation. With respect to the length and nature of the adjournment, I have other comments, but I can withhold those until after there may be other or different comments with respect to the adjournment itself, as the Hearings Examiner wishes.

HEARINGS EXAMINER: You're referring now as to when

we would reconvene?

MR. SHENKER: Yes.

HEARINGS EXAMINER: I think probably it would be appropriate in that regard for the record to show that when we do reconvene, we will reconvene right where we left off here today, if possible. If somebody is ill or can't make it, we will make appropriate adjustments at that time, but as to when we will reconvene, I put in the record in my preliminary thing, we will convene at the continuance of the Board of Health hearing. Why don't we first see if there are any objections as to continuing the Board of Natural Resources hearing and getting that transcript incorporated, and then go into the other matter, will that be all right?

MR. SHENKER: Fine.

HEARINGS EXAMINER: Do the Applicants have any objections to this procedure of continuing the one hearing and giving the record and incorporating it in the other hearing? Mr. Peterson?

MR. PETERSON: We have no objection, Mr. Davis, on the basis that the entire proceeding in which we are proceeding is under the Montana Utilities Siting Act.

HEARINGS EXAMINER: Mr. Meloy, do you have any objection?

MR. MELOY: What was Mr. Peterson's objection?

HEARINGS EXAMINER: They had no objection. He explained his reason that that is if the basis for the entire procedure is under the Utilities Siting Act.

MR. MELOY: It is my understanding that we are presently functioning before the Board of Health. Is that right?

HEARINGS EXAMINER: We're before both of them right at the moment. I'm now serving as Hearings Examiner for the Board of Health and the Board of Natural Resources. I intend to be solely Board of Health here shortly, when we get through completing our record on this matter.

MR. MELOY: You are calling for objections?

HEARINGS EXAMINER: I'm asking for objections or discussions as to whether you want to make a record of your position if you oppose it, not continuing jointly. Now, as I recall, you're the one, or one of the parties, who objected to the joint hearing to start out with.

MR. MELOY: I have no objection, Mr. Davis, to incorporation of the record; however, I object to the holding of a joint and concurrent hearing. The Siting Act, as well as the laws under which the Board of Health operates, require this hearing to be entirely separate. I therefore, for the record, would like to object to the holding of this joint and concurrent hearing that we are presently in, as I understand.

HEARINGS EXAMINER: Very well. Your objection will be noted on the record. We won't be in it very long, but we need to complete our record at this point, I think. Mr. Graybill?

MR. GRAYBILL: The Northern Plains Resources Council objects to holding a joint hearing. I understand

we're going into a separate hearing in a moment, but for the record, we continue that objection. I think from listening to the discussion so far that it is not perfectly clear what is intended. I understand the intent to be to keep a transcript of any Board of Health hearing and certify it to the Board of Natural Resources. I have no objection to that. I do not feel that any Board of Natural Resources transcript should or need be certified to by the Board of Health, and I think we may have talked about them without determining or distinguishing which one we're talking about. Is that a correct analysis, Mr. Hearings Examiner?

HEARINGS EXAMINER: That's completely my understanding. The Board of Health hearing will be certified to the Board of Natural Resources. The Board of Natural Resources hearing will not go to members of the Board of Health.

MR. GRAYBILL: That's fine, I have no objection.

HEARINGS EXAMINER: Mr. Brown?

MR. BROWN: Mr. Davis, the Department of Health has no objection.

HEARINGS EXAMINER: Mr. Klinger? I guess you fellows are on the same side, aren't you?

MR. KLINGER: Yes.

HEARINGS EXAMINER: Very well.

MR. MELOY: Mr. Davis, excuse me for just one second.

HEARINGS EXAMINER: Yes, sir, Mr. Meloy.

MR. MELOY: A point of information -- is it my understanding that based on discussions in the hearing previously, I think at the outset of the hearing before the Board of Natural Resources -- that certification of the record -- the Health record -- to the Board of Natural Resources will not preclude anyone from submitting evidence with regard to air and water quality matters which may or may not relate to standards, is that correct?

HEARINGS EXAMINER: That's correct. Mr. Shenker, you have another question?

MR. SHENKER: Yes. Before we adjourn the Board of Natural Resources portion of the joint and concurrent hearing, we should determine until what time it is adjourned, and I should like to address that. At this time, on behalf of the Department of Natural Resources and Conservation, we do move to adjourn that portion of that joint and concurrent hearing as relates to the Board of Natural Resources and Conservation until after the disposition of the issues presented to the Board of Health and Environmental Sciences in this hearing.

HEARINGS EXAMINER: My understanding of the effect of your motion is that you're requesting the Hearings Examiner to grant an adjournment of the Board of Natural Resources hearing until such time as the Board of Health receives its transcript and either certifies or does not certify?

MR. SHENKER: That is correct.

HEARINGS EXAMINER: Very well. Any further comments on that? Mr. Peterson?

MR. PETERSON: The Applicants resist this motion. It's the position of the Applicants that we are proceeding in one hearing under the Utilities Siting Act, and that hearing was duly noticed and commenced, and that the provisions relative to whether or not the proposed plants will violate state and federally-established standards and implementations plans are decisions to be made in accordance with the Utilities Siting Act provisions and that there is no basis for making an adjournment of other matters which must be discussed and proven in the hearing under the Siting Act before the Board of Natural Resources. It's the position of the Applicants that we should continue with the hearing until its final conclusion and then the entire record will be before both boards.

HEARINGS EXAMINER: Now, Mr. Peterson, I think I understand your position except your last statement.

MR. PETERSON: The entire record will be before the Board of Natural Resources and the record on air quality would be before the Board of Health.

HEARINGS EXAMINER: Fine. I just wondered if you were making a request. I wasn't fully aware. Very well, I understand, I guess, what your position is on this. You're on one side or the other. Does anyone else want to speak to this matter as to when we reconvene? Mr. Graybill?

MR. GRAYBILL: Yes. We've all been aware of the serious problem as between parties as to when to adjourn this hearing. I'm sure that it's obvious to everyone that the Board of Natural Resources hearing is going to be a long one and an expensive one in a number of ways, and we are also all aware that under the statute the decision of the Board of Health could be conclusive, and I think that one of the purposes of the Department's motion must be to conserve everyone's assets to the extent that we find out the answer to the Board of Health's question before we proceed; however, I do recognize in the statement of the motion as it's been set forth, an area which I believe I've noticed the Applicants objecting to before, and that is, that the motion as stated, says that we would adjourn the Department of Natural Resources hearing until after disposition of the issues presented in the Board of Health hearing, and I am sure that the Applicants worry about whether that matter is appealable matter and could therefore, after decision by the Board of Health, be appealed and therefore there would still be no determination of the issue presented, and so I would like to make a second substitute or amended or just a second motion, which I think adequately and more fairly compromises the true situation, and although I don't know whether it will be agreed to by the Applicants, I think it does accomplish some of their purposes. The Northern Plains Resource Council would move to adjourn the Board of Natural Resources hearing

until the Board of Health has disclosed the issues raised by the hearing before it, with the clear understanding that in saying that, I do not mean to stop anyone from appealing, either side, but I do mean that after the Board of Health had announced its decision during the time that anyone might care to appeal, if they did, we would go on with the other hearing. In other words, this obviates any long drawn-out adjournment during the time that either side might appeal, if it's possible to appeal, and I realize that's even open. This would have the effect of adjourning the Board of Natural Resources hearing only during such time as we take with the Board of Health hearing and whatever time we can urge the Board of Health to determine its decision in and not in the appeal time that might run thereafter. Does the Hearings Examiner fully understand my motion?

HEARINGS EXAMINER: I think I do, Mr. Graybill. Now, I don't think you have to amend the other motion. I think in this type of proceeding, we do have a motion before us. You have a second motion. I'm willing to hear any other, because I feel we'll then take them all under advisement at this time anyway rather than make a ruling, and see where we are. We'll all be together here, I guess, in the Board of Health matter, and it will be the same people, and we'll have a little more chance to see what happens. Mr. Meloy?

MR. MELOY: I would like to reluctantly oppose my colleague and friend, Mr. Graybill's motion on several

grounds, No. 1, should the Board of Health decide that the proposed facility will not meet air and water quality standards, it is our position that that decision is dispositive of this entire case; therefore, it is our position, it would be of no sense to continue to the Board of Natural Resources hearing after that decision had been made. If that decision were positive, that is, if the Board of Health were to determine that the proposed facility would not violate state air and water quality standards, then it would be necessary, or perhaps at least probable, that one party would challenge that decision, in which case we would all be up before a District Court somewhere. I'm not sure how this party could put its attorneys up to handle both of those, a court case, and continue along in this hearing, at the same time, so if it were the thrust of Mr. Shenker's original motion that we continue with the Board of Natural Resources hearing again after disposition of the issues before the Board of Health, then I would support that motion instead of Mr. Graybill's.

HEARING EXAMINER: Mr. Brown, are you the spokesman for your party?

MR. BROWN: Mr. Davis, we neither support or oppose either of the motions that have been made; however, we do have a concern that the decision to be made in the Board of Health proceeding be made as expeditiously as possible. In addition, we are concerned about the number of man-hours, the amount of money that is being spent, both by

the Applicants and all the parties to these proceedings, and from the comments made by Mr. Meloy, we do agree that the decision to be made by the Board of Health and Environmental Sciences is, in our opinion, dispositive of the air and water quality certification question, and from that standpoint, if there is any possibility that that decision will bring an end to the proceeding, then we are concerned that no further expense be incurred until a court of law has had an opportunity to review that decision.

HEARINGS EXAMINER: Thank you, Mr. Brown. Do the Applicants wish to respond to any of these motions or to the statements that have been made? Mr. Peterson.

MR. PETERSON: I think it should be pointed out to the Hearings Examiner that under the Utilities Siting Act, as of March 16, 1973, that act superseded all other laws and regulations in effect to all matters contained in the Utilities Siting Act. The Act provided that if any provision of the Utilities Siting Act was in conflict with any other law of this state, or any rule or regulation promulgatedunder any other law of this state, then the Utilities Siting Act shall govern and control, and such other law, rule or regulation shall be deemed superseded for the purpose of the Utilities Siting Act. Now, those are not idle words. The Applicants in this case paid a filing fee of 1.2 million dollars in order to effectuate the purposes of the Act. Money thus has already been expended and it should not be a concern at this

time because of the substantial amount of the filing fee. There should be plenty of money under that filing fee to carry on the proceedings under this Act. It's the intent of the Siting Act that the Applicants have their full day before these Boards relative to their application, and it is incumbent upon the Board of Natural Resources to issue or not issue a certification in accordance with that application, which may or may not include any findings by the Board of Health. It's the position of the Applicants that we cannot have our full day before these Boards under the proposals made and the motions of Mr. Graybill or the proposal made by Mr. Shenker on behalf of the Department of Natural Resources, because what the practical effect of those motions will be is to run the Board of Health proceeding through the courts and back, possibly, until the Applicants get their full day before the Board of Natural Resources, as the law says they're entitled to have. It's the position of the Applicants that the Utilities Siting Act is a one-stop statute relative to all matters, relative to siting of the power plants in this state, and that any other laws and regulations promulgated by other boards or bureaus, are superseded by the Siting Act.

HEARINGS EXAMINER: Very well, do you wish to respond? Mr. Shenker?

MR. SHENKER: In the first place, I don't believe it is the function of the Applicants to tell the Department of Natural Resources how it shall do its statutory job,

how it shall discharge its statutory responsibility, under the laws of this state, on the expenditure of funds. It is well known, it is, in fact, the law of this state, that if the funds as paid by filing fees are not expended in connection with studies or hearings, that there is a valid legislative purpose to be served in the retention of those funds rather than wasting them. It is certainly the case that if the hearing is prolonged, continued, or carried out beyond a point that is necessary by law, or appropriate by law, then there would be a waste of such funds. Secondly, although Mr. Peterson was reading from Section 70-823 with respect to the fact that the Utilities Siting Act supersedes other laws or regulations, of course it is not the case that the Utilities Siting Act supersedes itself, and the Utilities Siting Act is precisely the instrument which tells the people of this state by statute that the duly qualified air and water quality agency shall make the conclusive judgment on whether the proposed facility will meet state and federal air and water quality standards. Therefore, the Siting Act itself dispositively tells the Applicants and everyone else that there is an agency, not the Board of Natural Resources and Conservation, which will make a conclusive judgment on that issue, which can be dispositive if it is negative as a certification. Thirdly, Mr. Peterson says again today, as he has many times in the past, that the Applicants feel that they are entitled to their full day in court. Let us put to rest

right now the suggestion that in order for the Applicants to have their full day in court, it is necessary for everyone else to have a subsequent full day in court after the Applicants have failed to carry their burden with respect to any requirement under the Utilities Siting Act. It is not true in a court of law and it is not true in administrative proceedings of any kind that applicants who seek something from an administrative tribunal have the right to hold all other parties to the proceeding to the putting on of their evidence at the whim of the Applicants if they have failed in their burden. When Mr. Peterson refers to the Utilities Siting Act as a one-stop act, the only part of that reference that needs further clarification is when does the stop occur, and it is my construction of the Utilities Siting Act that it may very well be that the stop happens if the Board of Health and Environmental Sciences, given an opportunity to consider the matter, certifies that the proposed facilities will not meet air and water quality standards. At that point, the one-stop has occurred, and at that point, the application must fail. It is the intention of our motion to facilitate that construction of the Utilities Siting Act so that we can have an expeditious and lawful proceeding to its conclusion, not to its waste, and not to the disutility of the people of this state.

HEARINGS EXAMINER: Has everybody said everything they want to say? Mr. Graybill.

MR. GRAYBILL: I'm disappointed that apparently Mr. Peterson doesn't understand me. Mr. Peterson, I hope you'll avoid the reflex action that the Montana Power Company often has when I deal with it. I did not suggest that you be run back and forth to the appellate courts before we continue this. I suggested just the opposite of that. I suggested that we go ahead with this hearing while either you or us appeal, and you lumped me with everyone else and apparently don't understand my motion. Now, if you don't understand it, I surely want to try and explain it to you.

MR. PETERSON: Well, thank you, Mr. Graybill, and I certainly appreciate those awesome words.

MR. GRAYBILL: Do you understand it?

MR. PETERSON: Yes, Mr. Graybill, but what you say on one hand and what other parties may do on another is the reason that I made the statement that I did. I very well understand that there may be injunctive proceedings and everything else to try to stop any further proceedings when there is a certification by the Board of Health.

MR. GRAYBILL: Well, I want you to understand that as far as I'm concerned, if we get the Board of Health's decision first, then if I don't like it and want to appeal, I certainly might, but I certainly wouldn't attempt to stop you from going ahead with your hearing here if you had a right to do that. I want you to understand that. That's my point and position, and I don't

1 think you should characterize it incorrectly in your re-
2 buttal, that's all.
3 MR. BROWN: Mr. Davis?
4 HEARINGS EXAMINER: Yes, sir?
5 MR. BROWN: I would like to briefly discuss a point
6 that has been raised concerning whether the Utilities
7 Siting law is, in fact, a one-stop process. The Depart-
8 ment of Health and Environmental Sciences has maintained
9 throughout this proceeding, and prior to this proceeding,
10 that the authority of the Department to regulate discharge
11 of pollutants into the air in the State of Montana is
12 directly related to their permit authority under the
13 Clean Air Act of the State of Montana. That Act was
14 passed in response to national legislation which requires
15 the states, if they so desire, to control those dis-
16 charges, to adopt legislation to control the discharge
17 of pollutants into the air. The State of Montana acted
18 and did pass such an act. Section 69-3911 of that act
19 clearly provides that before such discharges can be made,
20 a permit must be obtained from the Department and Board
21 of Health and Environmental Sciences. If the Applicants
22 want to argue that the Utilities Siting Law has supersed-
23 ed the Health Department and the Board's jurisdiction in
24 this matter, then I fear that they are going to run
25 head-on into an old principle of law, and that is, the
26 passage of state legislation cannot supersede federal
27 legislation, so if they want to argue that they don't have
28 to come before the Department and Board of Health and

Environmental Sciences to obtain a permit, that's fine, because they are going to have to go to the Environmental Protection Agency to get such a permit, and we are only asking that it be recognized that the key to the enforcement of the Clean Air laws of this state does not reside in the Utilities Siting Law. It resides in the Clean Air Act of the State of Montana, and it is only in that act that the Department of Health and Environmental Sciences has the enforcement authority necessary to prohibit discharges which might violate appropriate state and federal standards.

HEARINGS EXAMINER: Mr. Brown, so I understand -- am sure that I understand what you're saying -- is it the position of the Department of Health and Environmental Science that at the conclusion of these hearings, assuming, now, that the Board would conclude that they would not certify, is there going to have to be another proceeding to see whether they will not issue a permit; if they assume that they do certify, then will they issue a permit, or is there going to be another entirely different approach on that?

MR. BROWN: No. Our position has been stated, I believe, on several occasions. We have requested the Applicants to come in and file a request for a permit under Section 69-3911, and we fully intend to treat that application for a permit as a request for certification so that we can combine all the necessary considerations to determine whether or not that facility can comply with

appropriate state and federal standards at the same time, and that, of course, would be during this proceeding. As of this date, we have not received such a formal application for a permit under Section 69-3911.

MR. PETERSON: Mr. Davis?

HEARINGS EXAMINER: Yes, sir, Mr. Peterson.

MR. PETERSON: I would like to clarify one position as far as the Applicants are concerned, and that is, that the Applicants are well aware of the fact that we are before the Board of Health. The Applicants are further well aware that the enforcement policies of the Board of Health cannot and will not suffer under any certification process under the Utilities Siting Act, because that act under Section 817, specifically states that the water quality agency has the firm authority and retains that authority to enforce all of the standards relative to state and federal standards and implementation plans for air and water quality standards. We do not contend that that enforcement power of the Board of Health is in any way affected by any certification proceedings under the Utilities Siting Act. The problem, I think, is one of procedure. The Applicants have felt that they have adequately filed an application pursuant to the Utilities Siting Act and that publication on that application was given to this entire state, including the Department of Health and the Board of Health. The Board of Health's hearing, of course, was commenced on this date after a District Court decision stating that

they are the proper agency under which to hold a certification proceeding within the context of the Utilities Siting Act, and it is the Applicants' position that that is exactly what we are doing here today, and we don't, indeed, impinge upon any of the enforcement authority given to the Board or Department of Health by law. Mr. Brown has stated that an application may be necessary under the Clean Air Act. The Applicants feel that there is a serious legal question involved relative to an application having to be filed under the Clean Air Act and also, under the Utilities Siting Act. The unfortunate thing about it is that the Applicants, as well as the Board of Health, have been put in this position because of the manner in which the Utilities Siting Act is drafted, and because of that, it appears to the Applicants, and I think it probably will appear the same to the Board of Health, some matters will have to be decided judicially to straighten out this procedure. This being, however, the first case to be filed under the Siting Act, it does leave the act itself open to various interpretations. In order for us to proceed with the application and to receive an expeditious determination relative to certification on all issues before both Boards, we feel that the concurrent hearing that is being conducted before the Board of Natural Resources and the Board of Health will take care of the procedural aspects which do, in some respects -- which are, in some respects -- troublesome because of the language of the Act. This does not

mean to say that the Applicants' position is not that we are not proceeding under the Utilities Siting Act, because we do take the firm position that we are, and we recognize that there can be a difference of opinion and probably is a difference of opinion held by counsel for various boards in this state, and not through any fault of their own.

HEARINGS EXAMINER: Mr. Meloy?

MR. MELOY: Mr. Davis, I would like to have the opportunity to respond to Mr. Peterson's statement.

HEARINGS EXAMINER: Very well.

MR. MELOY: As to his feelings as to the meaning of the Utilities Siting Act with regard to the certification of the Board of Health, I can do that. If someone else wants to respond to the more instant issue, I can do this later.

HEARINGS EXAMINER: Well, let's put whatever you want on the record. You may respond and then we'll go ahead.

MR. MELOY: Mr. Shenker very clearly told you, Mr. Davis, of the patent meaning of the statute 710(1)(h) which provides for a conclusive judgment to be made by the air and water quality agencies. I can expand a little bit on that by saying that the idea of a one-stop act was presented to the Legislature when this act was originally introduced and heard in committee. The utility representatives submitted amendments to that section so that the final conclusion and determination would be by the Board

of Natural Resources. That amendment was rejected in the House. It was again submitted in the Senate. It was rejected in the Senate. The utility representatives knew that section was there and they knew what the meaning of it was, and I think that one could not write that section any clearer to indicate that there is a separate determination to be made here by a separate board, and I concur with Mr. Shenker's position in this matter.

HEARINGS EXAMINER: Very well. I'll take the matter of the motions as to why we should not proceed with the Board of Natural Resources hearing at the conclusion of this hearing under advisement. I'll try to make a ruling to give all parties enough advance notice so they can take whatever steps necessary should it not be in their favor or to their pleasure. At this time the Board of Natural Resources hearing will stand adjourned and our transcript of that proceeding will stop here. I think our transcript of the Board of Health hearing will start at 10:00 o'clock, so we would have a duplication as far as the remarks we've made since 10:00 are concerned; however, if anyone thinks that creates a problem, I'll entertain any thoughts on it. I think we should stop this transcript here, and it does stop here as far as the Department of Natural Resources is concerned.

MR. PETERSON: Mr. Davis?

HEARINGS EXAMINER: Yes, sir.

MR. PETERSON: The word "stop" is one which we don't

feel is quite appropriate under the Act. We feel that the transcript continues on under the Siting Act in the hearing before the Board of Natural Resources and I believe it has already been decided that they're going to receive this entire transcript.

HEARINGS EXAMINER: Right.

MR. PETERSON: What we are doing is excising out of the transcript at the present time those portions relative to certification within the ambit of the Board of Health hearing.

HEARINGS EXAMINER: Yes. In other words, if I adjourn the hearing, we've got to certify transcript up to the point of adjournment as far as the Board of Natural Resources; at least, that was my view. Then we're going solely on the Board of Health hearing, and that transcript then will be incorporated into the Board of Natural Resources.

MR. PETERSON: Then, in order to keep the record clear, as far as the Applicants are concerned, in view of the fact that a hearing has been noticed for this date before the Board of Health relative to certification questions on air and water standards, the Applicants would move that the hearing before the Board of Natural Resources recess until the conclusion of the evidence taken pursuant to the matters before the Board of Health, and at that time, that it reconvene to continue the hearing before the Board of Natural Resources.

HEARINGS EXAMINER: Very well. We have a motion

from everybody involved. Are there any members of the public here who would want to make a motion, since this is a public hearing, or make a speech? (NO RESPONSE) Very well, I'll take the matter under advisement. We now stand adjourned, as I formerly stated. Do you feel you need a recess at this time?

MR. SHENKER: Mr. Davis, one technical point, if I may, before we finally cut off that transcript?

HEARINGS EXAMINER: All right, sir.

MR. SHENKER: I am concerned that we adjourn to some designated time or possibility; because motions are being taken under advisement, perhaps the Hearings Examiner might consider adjourning the hearing before the Board of Natural Resources and Conservation until further call by the Hearings Examiner for the purpose of ruling on the motions now under advisement.

HEARINGS EXAMINER: I believe I stated that we would adjourn until the conclusion of the Board of Health hearing. We will now stand adjourned until the conclusion of the Board of Health hearing or until further order of the Hearings Examiner. How would that make the record sound?

MR. SHENKER: I think that would do it. Thank you.

HEARINGS EXAMINER: I am concerned about making a proper record with all the time and expense going on in this matter. Let's take a ten-minute recess and get regrouped.

HEARING RECESSED AT 10:45.